ILCC PROCEEDING 01-0824
EXCEPTIONS (ATTACHMENT A)
PARAGRAPHS OF 3/27/02 PROPOSED ORDER EXCEPTED TO BY IRTBA
(WITH PROPOSED CHANGES NOTED)

10. Section 11(i) of the Act clearly references "clear evidence," contrary to IRTBA's assertions. Moreover, it is also the Act which imposes upon excavators the obligation to look for "clear evidence" of unmarked underground utility facilities. The Commission finds that deleting the proposed definition of "clear evidence" would only add ambiguity to excavators' obligations—obligations which the Commission is not free to waive for excavators. The Commission finds the definition of "clear evidence" in the first notice rule reasonable, with the exception of the reference to "faded marks from previous marking of a utility facility ~~and will not delete it from the second notice rule~~, which will be deleted due to its vagueness.

27. The Commission concurs in part with the objections to including "meaningful participation" and finds that it would not be appropriate to include the term in Section 265.10. However, the Commission agrees with IRTBA's assertion that utility facilities located on right-of-way of the Illinois Department of Transportation ("IDOT") must comply with the requirements set forth in 92 Ill. Adm. Code 530 ("Accommodation of Utilities on Right-of-Way"), which may impose a higher standard on facility owners and operators than that required by the Act. In addition, the Commission takes notice of the provisions of the Illinois Highway Code [605 ILCS 5], particularly Section 9-113, which may impose additional duties on utility owners and operators whose facilities are located upon, along, or under any highway, township road, or district road. While the Commission understands the intent behind requiring participation by utilities in the planning, design, and construction phases of projects, the Commission lacks sufficient basis to impose some of the additional requirements contained in the proposed definition. ~~In addition, some of the aspects of the proposed definition may go beyond or may be inconsistent with the Act. What is most problematic is IRTBA's proposal, at Section 265.200(b)(7)(c) of its version of the rule, that excavators not be held liable for any violations of the Act if a utility owner or operator does not fully satisfy the "meaningful participation" requirements. As Peoples/North Shore observe, t~~The Act requires persons engaged in excavation or demolition activities to take specific actions to avoid damaging underground utility facilities, regardless of the action or inaction of other interested parties. However, this does not, under any circumstances, excuse violation of Administrative Rule or Statute ~~Moreover, providing a complete defense to an alleged violation may, as Peoples/North Shore argue, encourage negligent or even willful damage to underground utility facilities if persons engaged in excavation or demolition activities know that a utility owner or operator has not satisfied its "meaningful participation"~~ requirements.

(the following portion of Part 27 not changed) Since the Commission will not incorporate such a waiver from liability in Part 265, which appears to be the primary reason that IRTBA seeks to add and define"meaningful participation," the Commission will not include the term in Section 265.10.

33. In light of the Dunteman decision and the arguments of those opposing IRTBA's proposal that depth be identified, the Commission finds that facility owners and operators need only locate facilities on the horizontal plane to comply with the Act. However, the Commission agrees with IRTBA's assertion that utility facilities located on right-of-way of the Illinois Department of Transportation ("IDOT") must comply with the requirements set forth in 92 Ill. Adm. Code 530 ("Accommodation of Utilities on Right-of-Way"), which may impose a higher standard on facility owners and operators than that required by the Act. In particular, the Commission takes notice of 92 Ill. Adm. Code 530.40 "Legal Obligations", particularly 92 Ill. Adm. Code 530.40(c), which requires an IDOT utility permittee to "locate, physically mark, and indicate the depth of its underground facilities within 48 hours, excluding weekends and holidays". The Commission finds the Dunteman case inapplicable, on its facts, to this situation, because the Dunteman case involved DuPage County right-of-way, not IDOT right-of-way. The Commission also recognizes the overriding public interests of IDOT, in the safe and efficient operation of the Illinois Highway System for the motoring public, and in IDOT's management of its right-of-way, its utility permits, and its utility permittees. While ~~T~~the Commission finds no inference in the Act that the General Assembly intended to require owners and operators to locate the depth of their facilities, the Commission also recognizes the higher standard required of utility permittees on IDOT right-of-way. Accordingly, while IRTBA's proposed Section 265.30(c) will not be adopted, the Commission, by reference, shall incorporate all provisions of 92 Ill. Adm. 530 where applicable. In addition, these statements should provide the clarification that IACE seeks.

47. IRTBA's deletion of language in subsection (b) is not consistent with the Act and will not be adopted, but IRTBA's added language in subsection (b) is found by the Commission to be reasonable. Subsection (c) should ~~also not~~ be deleted. ~~IRTBA offers no justification for omitting it while other parties have offered~~

~~sufficient reason to retain it.~~ Similarly, IRTBA's revisions to subsections ~~(d) and~~ (f) do not comport with the Act, as discussed by Staff, and should be disregarded, but the Commission finds IRTBA's proposed revisions to subection (d) to be reasonable~~.~~ The Commission finds revising Section 265.40(e) to reflect Section 4(e) of the Act to be reasonable.

81. The utilities and Staff both make good arguments for their preferred reporting deadline. To resolve this dispute, the Commission finds that an appropriate reporting deadline is 45 days. This compromise should balance the interests of those involved in a suspected violation of the Act. ~~In light of the Commission's rejection of IRTBA's proposal to that all reports be submitted in writing~~ The

Commission recognizes that alleged violations of the Act will usually require details and sketches of the incident area and the damaged facility, as provided for on its "Illinois Underground Utility Facilities Damage Prevention Act Incident Report". The Commission also recognizes the inherent difficulties in providing such details and sketches by telephone. Therefore, while~~,~~ the Commission ~~also~~ rejects IRTBA's proposal to modify subsection (d) to disallow the submission of reports by telephone and e-mail, the Commission will require that Commission staff, or any party accepting telephone reports of suspected violations on behalf of the Commission, utilize the Commission's "Illinois Underground Utility Facilities Damage Prevention Act Incident Report" to record the information communicated by the telephone report. In addition, the party recording the information will be required to verify the information with the party making the telephone report, to minimize the possibility of an incorrectly communicated telephone report. Where reports of suspected violations are communicated by e-mail, the Commission staff will make provisions to allow electronic of submission of nonverbal details and sketches~~. Revising subsection (d) as IRTBA suggests may deter individuals from submitting reports.~~ The Commission finds Staff's revision regarding the term "e-mail" appropriate and will incorporate it into the rule.

83. IRTBA proposes revising Section 265.200(b)(7) by adding language exempting an excavator from any liability under the rule if the encountered utility facility is at a depth of less than thirty inches or greater than ten feet. IRTBA asserts that an excavation or demolition contractor should not be penalized for ~~hitting~~ conflict with a facility that has no business being in its path at the time construction begins. According to IRTBA, there are few, if any, justifications for burying a facility less than thirty inches, and relatively few utility facilities exist at depths greater than ten feet, other than manholes, major water mains, sewer mains, or pipelines. IRTBA explains that such facilities have a tendency not to conflict with the majority of excavation or demolition operations, and should not be a source of damage complaints. In addition, IRTBA states that access-controlled rights-of-way, such as interstate highways, tend to restrict utility access, and, likewise, should not be a source of damage complaints. IRTBA also seeks to add to subsection (b)(7) a requirement that Staff consider the degree to which underground facilities are restricted from the public right-of-way in determining the amount of a penalty. Of greatest significance among IRTBA's proposals is the requirement that no violation be found if a utility is found not to have meaningfully participated in a public works project.

90. Like Staff, the Commission does not necessarily disagree with Ameren that subsections (b)(4) and (b)(6) are redundant; but in order to maintain consistency with the Act, will retain subsection (b)(6). Consistency with the Act is also important in addressing IRTBA's proposed modifications. As discussed in Section III, A, 8 above, IRTBA's meaningful participation requirements may not be consistent with the Act ~~and may in fact encourage behavior that is inconsistent with the public interest~~. IRTBA's recommendations that depth and the degree to which underground facilities are restricted from the public right-of-

way lack sufficient basis in the Act to warrant being expressly identified in the rule. While depth and restriction from a public right-of-way may be relevant in some circumstances, and utlility owner/operator compliance with Statutes and Administrative Rules are relevant in all circumstances, the Commission finds that the "special circumstances" language in the first notice version of Section 265.200(b)(7) is sufficient
to cover such circumstances.

91. ~~Nor is the~~ The Commission ~~persuaded to~~ adopts IRTBA's proposal that the penalty matrix that Staff intends to develop be created through a rulemaking. While ~~T~~the public interest ~~is best~~ may be served by allowing Staff to develop and, as it gains experience in these matters, modify the penalty matrix to be used in all cases of violations that it considers, the Commission finds that due process interests, and regulatory flexibility interests, mandate maximum publicity for a proposed penalty matrix, and maximum input for said penalty matrix. A rulemaking proceeding is the best vehicle for accomplishing these goals. Moreover, the record developed in the course of a rulemaking will provide useful guidance to the Advisory Committee, and to the Commission, in reviewing penalty assessments. Problems or concerns with any penalty matrix may then be brought to the Commission, which will be overseeing its development and application.

97. The Commission is inclined to agree with Staff and not include language stating that a warning letter shall have no penalty assessed with it since indirectly a penalty may be associated with a warning letter. The Commission is also not convinced of the need to notify all owners of a public right-of-way of Staff's determination of whether to send a warning letter or notice of violation. Those owners interested in a reported violation are certainly free to follow the process on their own. ~~IRTBA's proposal that facility depth, degree to which underground facilities are restricted from the public right-of-way, and degree of meaningful participation be considered by Staff is rejected as well. Each of these criteria have been previously addressed in earlier sections of Part 265 and found to be inappropriate for inclusion in the rule.~~

104. IRTBA recommends several changes to subsection (a). First among the changes is IRTBA's suggestion that the Advisory Committee not be allowed to meet via telephone. Ameritech objects to this recommendation on the grounds

that frequent meetings may be required and is concerned by the expense and time involved for the five members to travel across the state to a single location. Staff, on the other hand, supports IRTBA's revision. Staff believes the change is appropriate because Staff's presentation of cases at Advisory Committee meetings will be visual and will require the presence of Committee members. ~~The Commission appreciates both sides of this issue and finds that the Advisory Committee should be allowed to decide for itself whether particular meetings will be held in person or via telephone.~~ The Commission agrees with IRTBA and Staff, and will require the Advisory Committee to meet in person. ~~In the event that visual presentations are anticipated, the Advisory Committee may decide to meet in person. When members' actual presence is not necessary, the Advisory Committee may meet via telephone.~~ Accordingly, the language in the first notice rule relating to how the Advisory Committee shall meet ~~is deleted~~ has been modified.

107. ~~Like Ameritech, the Commission is also unsure of what IRTBA means by a de novo standard of review. Whatever IRTBA intends, however, the Commission is not inclined to direct that the Advisory Committee must use a de novo standard.~~ The Commission will direct that the Advisory Committee use a de novo standard of review, consistent with the standard specified in Section 265.400 of the Rules. ~~The standard of review that the Advisory Committee intends to use, however, should be identified in its bylaws.~~ Alleged violators who feel that they were treated unfairly by the Advisory Committee are free to appeal to the Commission, where a de novo standard of review will be applied.

109. At the outset, the Commission clarifies that all Advisory Committee meetings, whether they are with an alleged violator, facility owner or operator, or Staff are to be open to the public. An alleged violator or utility owner or operator is free to attend any Advisory Committee meeting The alleged violator shall be allowed present its side of its case, as may the Commission Staff. ~~and may at meetings where its case is being considered request permission to speak at the meeting. The Advisory Committee may grant such a request if it believes that hearing from the alleged violator or utility owner or operator will assist in resolving the matter.~~ IRTBA's proposal that an alleged violator have an absolute right to present its case before the Advisory Committee is appropriate, in the interest of having the alleged violator appear before a committee of its peers, who may have construction and public-interest insights not necessarily possessed by Staff. ~~is inappropriate as it may unnecessarily prolong meetings and may not be necessary for the Advisory Committee to come to a conclusion.~~

111. ~~The Commission is not persuaded of the need to have the Advisory Committee adopt bylaws through the rulemaking process.~~ Given that the Advisory Committee is an entirely new entity engaging in a function that the Commission has no previous experience with, the Advisory Committee should be ~~permitted some latitude~~ given guidance, through the rulemaking process, at the

outset in developing its bylaws. ~~Moreover, the Commission agrees with Staff that there is insufficient time to complete such a rulemaking prior to July 1, 2002.~~

113. The Commission is uncertain what IRTBA means by "written record." The Commission agrees that some sort of written record of Advisory Committee meetings should be kept and to this end will require that the Advisory Committee take and maintain written minutes of each of its meetings. The Advisory Committee is free to provide for the creation other forms of written records in its bylaws. The Commission is unsure how IRTBA would have alternative dispute resolution methods implemented in this context. ~~In any event, the Commission is of the opinion that the procedures provided for in Part 265 adequately protect a party's due process rights.~~

116. Given the numerous steps contemplated in Part 265, the Commission is of the opinion that the process should not be allowed to linger. The Commission agrees with IRTBA and Ameritech that it is reasonable to impose some deadline by which the Advisory Committee must act on each matter brought before it. Since it is still uncertain how often the Advisory Committee will meet or what procedures it will follow, the Commission is concerned that the 30 days proposed by Ameritech is too short. The Commission is also not convinced of the appropriateness of beginning the time period during which the Advisory Committee must act from the date the notice of violation is mailed. Because not all notices of violation will brought before the Advisory Committee, the Commission sees little reason to tie the mailing date of the notices to Advisory Committee's deadline. Rather, the Advisory Committee's deadline should be tied to the date that an alleged violator requests review or a matter is referred to the Advisory Committee by Staff, as described in Section 265.230. From that date, the Advisory Committee should be given 90 days to resolve the matter. ~~In the event that the Advisory Committee does not resolve a matter within the 90 days, however, the Commission finds that Staff's prior determination in the notice of violation should stand.~~

129. IRTBA also suggests that the new Part 265 be gradually implemented over the remainder of the 2002 construction season, reaching its full effect with the

new 2003 construction season in April of 2003. In requesting this modification, IRTBA explains that most current construction work has been designed, bid, and priced in 2001 or earlier. The delayed implementation will give the industry time to prepare for the new regulatory climate, and include the added costs of compliance in 2002 bids for 2003 work, according to IRTBA. ~~Given that many of IRTBA's proposed revisions will not be adopted, the Commission is uncertain what particular regulatory costs IRTBA is concerned about.~~ Moreover, IRTBA does not specify how exactly implementation of Part 265 would be phased in. The Commission is not aware of any means to do so. In any event, the Act clearly specifies an effective date of July 1, 2002—a date which the Commission is not persuaded it may change.